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—BY—

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EDITOR OF THE CENTRAL LAW JOURNAL.

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ST. LOUIS, MO., JULY 28, 1911.

OREGON'S CONSTITUTION MAKING IT THE DUTY OF ITS SUPREME COURT TO ENTER FINAL JUDGMENTS ON APPEAL.

An amendment to the Oregon Constitution, to which we called attention in 72 Cent. L. J. 254, requires its supreme court to affirm any judgment appealed from, if it believes it was such as should have been rendered, "notwithstanding any error committed on the trial."

If the court believes the judgment should be changed, and shall further believe from the whole testimony, instructions and any other matter material to the decision of the appeal (all of which must be in the bill of exceptions) "it can determine what judgment" should have been entered in the court below, it shall direct such judgment to be entered.

The only exception to this power is that no greater penalty shall be imposed by the higher court in any criminal case.

This amendment also provides that "no fact tried by a jury shall be otherwise reexamined, unless the court can affirmatively say there is no evidence to support the verdict."

A very recent case, decided by Oregon Supreme Court, on May 16, 1911, starts the court on its career of applying this amendment in a cause tried prior to November 8, 1910, when the amendment was adopted, but in which the bill of exceptions was not settled until December 26, 1910. Wills v. George Palmer Lumber Co., 115 Pac. 417.

The court, in affirming a judgment for the plaintiff, discusses but a single proposition of law and that was whether the amendment applied to the case and held that it did.

The court first held that it could not affirmatively say there was no evidence to support the verdict.

Then it says the question must be considered: "What degree of misapprehension of the law, or mistake in its application should be regarded as immaterial."

Then the court proceeds as follows: "Giving to the amendment the liberal construction necessary to effect its purpose, we believe a fair interpretation of the altered organic law, regulating practice on appeal in this court, demands a careful examination of the entire record of the trial of an action at law * * * and if the judgment given is found to be such as should have been rendered in the case, an affirmance of the determination of the lower court should follow, without adverting to or commenting upon, in a memorandum opinion, any trivial errors that may have been committed. Where, however, it appears from such examination that the judgment complained of should be changed, and it can be determined what adjudication should have been given the proper entry must be made in this court."

Then the court goes on to say, in effect, that a written opinion stating why the court cannot render a judgment and directing such other proceedings as are not inconsistent therewith, should only be in reversals.

Suiting its action in this case to its rule, the court says: "Adopting these suggestions as a rule, we are of the opinion, after a careful consideration of all the matters submitted on this appeal, that the judgment should be affirmed, notwithstanding any error committed at the trial."

Looking at the record in this case it appears that the question of fact that was submitted to the jury was whether or not there was a reasonable safeguard around dangerous machinery. The court said: "Other defenses are interposed but they are not material."

The statement of facts shows nothing about the trial of the case. It is recited that: "It is maintained by defendant's counsel that the court committed several errors, to which exceptions were duly reserved." What the nature of these errors is, is not disclosed.

Indeed, but for this being a pioneer case, it is seen that affirmance would have been by a mere memorandum decision, with no written opinion at all.

We learn from one of our correspondents, that many Oregon lawyers are claiming that this method of disposition of a case settles nothing.

It might be replied that neither seems to the method which it supersedes.

We urged procedure very much on this line in our articles on reform in judicial procedure. See 72 Cent. L. J. 39, 57, 93, 111.

We thought the idea embodied in the Oregon amendment was eminently practicable of achievement, because perfect transcripts, through the aid of stenography and typewriting, may now be reproduced in appellate courts.

But we hear it is further urged that trial courts will be held less in check by such a system than before.

This is a slight objection as we view the matter. The idea of putting courts in strait-jackets is running all the changes in the gamut of public opinion. We want one court to oversee another, and the people to recall judges in both.

Checks and balances are looked for as if the plan of administering justice were a sort of bookkeeping affair.

In this way we appear to be constantly pouring water through a sieve. We invite long processions of words, which in turn call for others in a kind of arithemetical ratio, and we lose sight of substance because of so many voices crying in the wilderness.

England's law certainly seems as well settled as ours, and, if the Oregon Supreme Court does send forth a written opinion only once in a great while, it will be read and pondered.

And no member of the court will attempt to write an opinion, unless he has something definite to communicate, and he will do his very best to justify himself in asking a hearing.

No written opinion from that court may hereafter be expected to be a perfunctory sort of thing, nor a mere theoretical disquisition with a table of cases back of it.

If the lower courts do not, under the Oregon system, take a keener interest in their work and feel a greater weight of responsibility than before, the judiciary of that state will fall below what an American ancestry should give promise of.

The day of small things seems to be passing in Oregon, so far as they may afflict justice.

If American judges, when they may be measurably freed from the shackles, that make justice hobble through our courts, may not give as good an account of themselves as their English progenitors, then lawyers ought to be considered the only truly delinquent aggregation in America.

We believe that, when opinions will only be written by courts upon really important questions, the bar and the bench will enter upon a career of self-improvement, that will be a decisive step to the maintaining of its general morale and increasing its public usefulness.

Courts that write useless opinions will write themselves out of favor, and trial courts, which do not follow the spirit and justice of law, according to precedents approved by experience, will soon conclusively appear to be unfit to decide between lawyers.

As it is, trial judges are no more than figure-heads in a trial and appellate judges often but sticklers for tweedledum over tweedledee.

Breadth and knowledge in administration is hidden under the chaff cast off from the kernels of what is contended about.

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NOTES OF IMPORTANT DECISIONS

TRADE-MARK — EXCEPTION TO THE RULE THAT A REGIONAL NAME CANNOT BE USED AS AN EXCLUSIVE TRADE-MARK.—Since the associations law of France went into effect varied has been the litigation between the Carthusian monks and the French liquidator in reference to the famous "Chartreuse," the secret of whose formula the monks took with them to Tarragona, Spain, there to continue its manufacture.

So far as the United States is concerned a very sweeping decree has been ordered by the Federal Supreme Court in Baglin v. Cussenier Co., 31 Sup. Ct. 669.

The monks gained a fairly substantial victory in the lower courts, but they seemed determined to make the contest decisive and they obtained an amendment restraining the representative of the French liquidator "from using the word 'Chartreuse' in connection with the importing, putting out, or sale of such liqueur, or, cordial, as the name of or as descriptive of such liqueur or cordial, or without clearly distinguishing such liqueur or cordial manufactured by" the Carthusian monks.

It was claimed that "Chartreuse" was a regional word and no trade-mark could be acquired in it.

Justice Hughes, speaking for the entire bench, said: "The familiar principle, however, is not applicable here. It is not necessary for us to determine the origin of the name of the order and its chief monastery. If it be assumed that the monks took their name from the region in France in which they settled in the eleventh century, it still remains true that it became peculiarly their designation. And the word 'Chartreuse,' as applied to the liqueur which for generations they made and sold, cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian monks at their monastery. So far as it embraced the notion of place, the description was not of a district, but of the monastery of the order—the abode of the monks—and the term in its entirety pointed to production by the monks."

We do not see that the learned justice cites any authority for this conclusion, and we wonder if there can be found any case approaching it as a parallel. In this country it would seem more difficult for the regional idea to be displaced, or become merely incidental.

The conclusion the court draws is clothed, so to speak, with an aroma of antiquity, which the great government of France cannot wash away by its penal decrees.

To surround a liqueur or cordial with a sort of romance, claiming and being conceded, in a practical age, a standing in court, seems worthy, at least, of passing notice.

THE TRUST DECISIONS.

The public understands the decision of the Supreme Court of the United States in the Standard Oil case, to mean that every contract or combination alleged to be a monopoly or restraint upon trade, will be judged of upon its own terms and provisions. If, being so judged, it is found to be a monopoly or undue restraint upon trade, it will be declared void; if it is not so found it will be left alone. After reading the court's opinion a number of times, this is the conclusion in regard to it, that my own mind has reached, though I must admit the opinion to be a most confusing and perplexing document. I think therefore, the law is, that whenever it is alleged that a combination amounts to a monopoly or is an undue restraint on trade, the combination will be looked into and if it is found to be a monopoly or an undue restraint on trade, it will be broken up, otherwise not. The Sherman law makes "every" agreement in restraint of trade void. The court's opinion modifies this so as to make those void only which are burdensome and oppressive. This decision has put the trust question upon its true foundation and ought to end the trust question, though it probably will not.

But though I am far from desiring to disturb the result arrived at I think that tendency of the professional mind which prompts it to look into the reason for things, justifies a brief examination of the *ratio decedendi* in this case. The court says expressly in the Standard Oil case, that it does not overrule the Trans-Missouri case and the joint traffic case, but leaves them to stand just as they were decided. The purpose of the opinion is to distinguish the case then in judgment, from those cases. I, for one, am certainly not satisfied with the grounds upon which the

court seeks to distinguish the Standard Oil case from the preceding cases and I don't believe the bar of the country will be.

In the Trans-Missouri case, the government attacked under the Sherman law, a contract which the railroads upon the western side of the Missouri river had entered into, by which they undertook to regulate the cost of freight, as a contract in restraint of trade. The railroads set up this plea before the court. They said that there was nothing oppressive or burdensome in their agreement and though they put some restraints upon trade they were entirely harmless and really for the advantage of all parties concerned. That the court should not take the text of the Sherman law literally, but should understand it in its spirit, and it should therefore hold that it intended to forbid those contracts and combinations only which put "unreasonable" restraints upon trade. The court met the proposition fairly and squarely. It said in express terms that the plea required it to read the word "unreasonable" into the statute, but that it had no such power and it must enforce the statute as it was written, that is as condemning "every" contract or combination in restraint of trade, whether it was reasonable or unreasonable. There can be no possible doubt about this being the plea of the railroads and this being the answer to it that the court in express terms made. The court now says, however, that the Sherman act only condemns those contracts and combinations that are undue or unreasonable restraints on trade, but that it does not overrule the two former cases. The average mind will have great difficulty in understanding how this can be possible. But I will defer for a moment a discussion of how I understand the court to reconcile the two positions.

Though the court does not say so in terms, I understand the English of its decision in the Standard Oil case to be this: That all that was actually decided in the Trans-Missouri and Joint Traffic cases, was that the contracts then before the court were oppressive and burdensome restraints on trade and therefore void. That the court in dealing with those cases said a great many things not necessary to be said in order to decide the question actually before it and that amongst these unnecessary things was its discussion of the words "every" and "unreasonable"—that is, it could have decided the cases without ever saying one word about those words. That what is said in regard to them is therefore *obiter dictum* which the court is not bound by and in regard to them and it now puts its own independent interpretation upon the Sherman act. This modification is foreshadowed in the opinion of Justice Brewer in the Northern Securities case.

Whether this view is or is not sound, depends, of course, upon the effect of what the court said and did in the two former cases. The railroads set up as a plea in bar, that the Sherman act was to be read as though the word "unreasonable" was in it. The court overruled the plea and said it must enforce the act as it was written and declare void every contract or combination that put a restraint upon trade, whether reasonable or unreasonable. Was this a judgment of the court or was it only reasoning and argument? If it was a judgment, the Standard Oil case has overthrown it; if it was only an argument and reasoning, the court could follow it or not, as it felt disposed. The debates upon this subject will probably be as long and continuous as those on the effect of the "Rule in Shelley's Case" and Justice Harlan's dissenting opinion, in which with great ability he sums up the reasons for the former action of the court being its decision, will long be cited to prove that the court made a great error in arriving at the conclusion it reached.

But however this may be, a great body of the people will be grateful to the court for making its error, if error it be, rather than to have adopted the view of the subject which Justice Harlan would have had it adopt. The Sherman law as written, is

the most outrageous, harmful and impossible statute that ever came from the hand of the law-maker. To make void "every" contract that puts any restraint upon trade, is to cut the heart out of the entire business of the country and Justice Harlan would have given this effect to it. There is no co-operative business that does not put some sort of restraint upon some sort of trade somewhere. A and B live in South Dakota. B has been engaged in the business of buying wheat and shipping it for sale to Chicago. A is engaged in the cattle business; they form a partnership for the cattle business but A makes B agree that he will give up the wheat business and give his whole time and attention to the cattle business. A harmless restraint has been put upon the wheat business but the cattle business has been greatly strengthened; and this is so of all business. It is filled in every direction with restraints upon trade, in great affairs as well as small, but they are harmless and are absolutely necessary to the business of the people. The upshot of the matter then is, that we have at last gotten out of the woods though by most devious by-paths. But this could be endured if we were permanently and effectively out of the woods. But what assurance have we that we are? Congress may at any time pass an act, declaring that it did not intend that the Sherman law should be read as the court construes it and that it intended and intends for the future to forbid "every" restraint upon trade, whether reasonable or unreasonable. If it does this where will we then be?

It is a pity the court did not take the case up where the Trans-Missouri and Joint Traffic cases put it, as it has most probably to do sooner or later, meeting the situation fairly and squarely and dealing socialism a blow that would at least have staggered it. Viewing it from that standpoint, it was the greatest cause ever pleaded before any human tribunal. It stood at the parting of the ways.

Upon the one hand was the old, upon the other hand was the new; upon the one hand was the stage-coach and the ox-cart; upon the other hand was the steam car, the telegraph and the telephone. The Sherman law would hold us to the stage-coach; the new view might lead us to aviation.

The framers of the Constitution of the United States were wonderful men, but wise as they were, they builded better than they knew. They had no conception of many things that are included in that Fifth Amendment. It forbids Congress to deprive any person of life, liberty or property without due process of law. But so long as the Constitution stands, this provision is going to be the sentinel at the gate and it is going to insure that development and progress which evolution and the survival of the fittest make the law of life.

One of the most surprising things connected with this whole subject is the fact that when the Sherman law has been before the Supreme Court of the United States, it has not been taken literally and its constitutionality thus understood, contested. It is amazing that instead of trying to get the word "unreasonable" read into the act, counsel have not boldly taken the law by the throat and said to the court that when Congress undertakes to forbid "every" contract in restraint of trade, it undertakes to do what no American legislator is clothed with authority to do, and its action is unconstitutional and void. Yet such is the case. When the Trans-Missouri case was argued and decided, not one word was said against the constitutionality of the act. When six months afterwards the Joint Traffic case was argued, a perfunctory attack was made upon its constitutionality by a man who stole his thoughts from another and then failed to present them so that the court could understand and appreciate them. A full account of this can be seen in the fourth chapter of a volume, published in the spring of 1909, by the Neale Publishing Co., of New York, entitled, "Some Reminiscences by William L. Royall."

In the two elaborate arguments that were made of the Standard Oil and American Tobacco cases no argument was made

against the constitutionality of the act, so that its constitutionality as passed by Congress and as condemning "every" contract in restraint of trade, remains to this day an open question. That the reactionaries of the country are going to force this issue sooner or later, if they can, goes without saying. It was involved in "free silver," in "government by injunction." It is involved in the initiative, referendum and recall in the undiscriminating clamor against monopoly, in Wm. J. Bryan's rejoicing at Justice Harlan's dissening opinion. Sooner or later that conflict which inheres in the condemning of "every" combination in restraint of trade and the Fifth Amendment which forbids Congress to deprive men of life, liberty or property, must be fought out, if the reactionaries can force the issue, and the result will tell whether we are to have socialism or a constitutional government?

Foreseeing the tremendous consequences that would necessarily flow from the Standard Oil and American Tobacco cases if the court adhered to the interpretation of the Sherman law made in the Trans-Missouri and Joint Traffic cases and continued to say that the Sherman law forbade "every" agreement in restraint of trade, I published in this journal of October 1, 1909, an article in which I undertook to show that that interpretation made the Sherman law unconstitutional and void. I think it timely to state here some of the considerations that lead to this conclusion, as they may have an influence in deterring Congress from changing the Sherman law so as to undo what the court has done in the Standard Oil case.

Sherman Act Literally Construed Unconstitutional.—The citizen has a natural and inherent right to do any act whatever that is intended bona fide to be for his own advantage and that does not aim at doing a wanton injury to someone else. Some two hundred years ago a case was decided in England that puts this proposition in a very clear light. A man had a water front where he shot ducks at a decoy for a living. Another man who hated the former had the adjoining water front. This latter walked up and down his water front firing his gun off for the purpose of driving the ducks away from his neighbors front. The latter sued him and recovered damages. Lord Chief Justice Holt, who tried the case, said: "Suppose, for instance, the defendant had shot in his own ground. If he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing, and a wrong. If the defendant using the same employment as the plaintiff, had set up another decoy so near as to spoil the plaintiff's custom, no action would lie because the defendant had as much liberty to make use of a decoy as the plaintiff."

Now this contains the germ of the whole law of competition. You may do what you will to advance your own interests but you must inflict no wanton injury upon your neighbor. The Fifth Amendment to the Constitution of the United States forbids Congress to deprive any person of life, liberty or property without due process of law. The right to do what you will to advance your own interest is a "liberty" which the Fifth Amendment protects. This includes the right to compete with your neighbor to the point of destroying him, if you compete fairly. The principle is involved in the case of Royall v. Virginia, 116 U. S. Rep. 572. But a most important point relative to intention must be noted here. You have no right to fire off your gun for the purpose and with the intention of driving the ducks away. You have no right to inflict wanton injuries upon your neighbor. But you have a perfect right to destroy him by fair competition, in order that you may get the whole business for yourself even though it is your purpose and intention to destroy him. This is evolution. This is Mr. Darwin's survival of the fittest. This is a distinction that must be borne in mind all the time.

The right to make the ordinary contracts involved in competition is nothing but the right to make the ordinary every day con-

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tracts of business and it is a liberty which is protected by the Fifth Amendment. The Sherman law forbids "every" contract that puts a restraint upon trade. These ordinary contracts, in great affairs as well as small, inevitably put restraints upon trade, as in the wheat and cattle case cited above. The Sherman law puts an embargo on these and is therefore void.

Restraints Upon Trade.—Nothing in the law has given the courts more trouble than the doctrine of restraints upon trade. It was at last finally settled in 1894, in the case of Nordenfeldt v. Maxim, that the test whether a particular restraint was or was not lawful, lay in the question was it reasonable or was it unreasonable. If reasonable, it was good; if unreasonable it was bad. This case relates backwards and establishes that from the beginning, it was one of the fundamental rights of citizenship to put reasonable restraints upon trade. This also has always been a liberty of the citizen and so likewise of monopoly when monopoly is properly understood as will be explained further on. I mean that the citizen has a fundamental right to establish a monopoly, according to the popular view of monopoly, but not according to the legal view, which is the true view.

Congress has a perfect right then to forbid oppressive, burdensome and unreasonable restraints upon trade and to forbid wanton injury to citizens and monopolies when properly understood; but it has not power to forbid harmless and reasonable restraints upon trade or any other acts intended to be bona fide for the benefit of the person acting; and as the Sherman law forbids "every" combination in restraint of trade it condemns these as well as the vicious ones and is therefore void.

Acts by Many.—This being established as the right of the citizen, it is to be noted that whatever one may lawfully do, when acting alone, numbers may do when acting together and in concert. There has been some controversy about this, but I think the authorities I cited in the article referred to above put this beyond question.

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If then, many may when acting in concert, do whatever one may do when acting alone, it follows that the great corporations called trusts may do all such things as the single citizen may do, and that they are protected in this right by the Fifth Amendment. Congress has no right to legislate against them in a way that would not be permissible, if the legislation were directed against individuals. I can conceive of but one answer to this and that is to say that great corporations with enormous wealth stand upon a footing different from that of the individual because of their great wealth. But that is to say that our institutions are opposed to the acquisition of great wealth when such is not the case. Our institutions encourage the accumulation of wealth. All that they are opposed to is the use of the power which wealth gives, to do, unjust acts. It is the function of the government to stand between the strong and the weak and keep the strong from imposing on the weak and when this is the theory upon which our institutions are administered every man will be permitted to acquire all the wealth he can get by fair trade; and the weak will always be protected from the impositions of the strong.

The crying evil in the case of the trusts is their custom of giving away their goods or selling them below costs for the purpose and with the intention of destroying weaker rivals. Stop this, and you would end the trust evil. Congress should aim its legislation at destroying this custom and then it would meet the situation intelligently.

Progress Work of Trusts.—The incredible improvements in the condition of mankind in the past century have almost all come from the work of great corporations. They promote the new enterprises, have built up the waste places, and if they are not unwisely interfered with in their legitimate work, though they should be carefully watched and held down to their legitimate work, the improvement in man's condition which they are yet to bring about is beyond the boldest dreams of human imagination.

If we frame our laws so as to put an end to the ability of great corporations, to further new enterprises and keep the wheels of progress in motion, we shall bring the world to a standstill and produce a condition of stagnation. Mutatis mutandis we could then say with Othello:

"Farewell the plumed troop and the big wars,
That make ambition virtue."

Stop the great corporations from putting harmless restraints upon trade and from establishing that sort of monopoly which our laws permit, to be directly explained, and the great corporations will go out of business and progress will be stunted in its growth. The evils of the trusts do not come from their wealth but from their abuse of the power which their wealth gives them. The remedy is not to deprive men of their natural and inherent liberties, but to put the government between the strong and the weak and compel the strong to live within their own bounds. Government prevents murder, arson and larceny, why should it not prevent the trusts from practices which are undoubtedly crimes?

Monopoly.—The common law was undoubtedly opposed to monopoly. Rex v. Waddington, 1 East 143, decided in 1801, is a decision of the Court of King's Bench, presided over by Lord Kenyon. In that case a man was prosecuted under the common law for buying up all the hops near a village in England. He was convicted, fined $2,500.00 and sent to jail for six months. The case was elaborately argued by the first lawyers in England and carefully considered by the court. The principle to be deduced from the case is this: that for the legal status of monopoly to arise, the party charged must have acquired what he holds, with the intention of unduly raising prices and he must have acquired a control of so much of a commodity as enables him actually to raise prices unduly. That is the law to-day and it is essential in considering this matter that this principle should be borne in mind, for it is not acquiring control of a great part of a commodity that constitutes monopoly, as the populace thinks, but in the eye of the law, by acquiring such a part of it as enables the party to unduly raise prices.

Now the quantity acquired in 1801 that would enable the party to unduly raise prices, and the quantity acquired to-day that would enable the party to unduly raise prices, are two very different things. A village in England in 1801 was practically cut off from the rest of the world. It had no means but the old methods for getting a new supply. But raw materials lie around everywhere now and means for manufacturing and presenting it are all about. To-day everything that is in the world, is at the beck and call of every locality. The telegraph and the telephone communicate orders instantly and steam cars running at forty miles an hour fetch the commodities. A man or a corporation would have to be alert to acquire so much of any commodity as would enable him or it to unduly raise prices. Besides, if it did raise them above the normal, there would certainly be competition, if the government curbed the monopolist and made it safe to compete with him.

In an interview with a reporter for *McClure's Magazine*, in June, 1910, one year after my article above referred to appeared, President Taft appropriated this thought, taken from my article, which first brought these thoughts forward, without giving me the smallest credit for it. In the number for June, 1910, of that magazine, page 216, first column, he says: "Monopoly before the law is not such merely by size but by conduct. You and I own two factories and seeing economies or other advantages of operation in combining them, have a perfect right to combine them, even if together, we should have a very high proportion of our particular industry. If one corporation should control an entire industry even that would not be a monopoly, providing it did so by legitimate means, by holding its trade through the superior economies and improvements made possible by large operations and by giving the pub-

lic the advantage of these. The business would be protected by what might be called potential competition. *There would always be other capital ready to go into the industry when the prices should be raised enough to show a profit.* But where a great corporation sets out to stifle competition by illegitimate means in such ways as by using its position in the industry to make exclusive contracts or to kill a competitor by selling goods at a loss, in one place, which is made up by higher charges in others then it frightens other capital from attempting to go into the same business; and not only is actual competition abolished but potential competition as well. The public is then at the mercy of a great corporation or an association of corporations because of the illegal use of its great power." All this was in my article.

There is no monopoly, therefore, to-day in the eye of the law unless the party has secured control of so much of a commodity as will enable him to unduly raise prices. I see no reason, therefore, why a holding corporation may not legitimately buy up any number of other and competing corporations. Why may not a man buy whatever he wishes to buy?

What is there in our institutions that says him nay?

The only effect is that he may become limitlessly rich, but our institutions are not opposed to that. All our institutions are opposed to his using his wealth in a way to oppress others and it is the function of the government to see that he shall not do that. Our institutions contemplate then that a holding company may buy up as many other companies that are competing amongst themselves, as it pleases to buy, providing it does not acquire a monopoly as above defined and the government will see to it that it does not oppress its rivals by a tyrannical use of its power.

Northern Securities Case. — But the Northern Securities case must be taken into consideration here. In that case Justice Harlan delivered the opinion of four justices and Justice Whited delivered the opinion of four justices and Justice Brewer delivered his own opinion so that there was no opinion of the court and nothing can be held to have been settled by that case, except that the combination then before the court was an unlawful one. But Justice Harlan said certain things had been settled by the previous decisions of the court, though I cannot find this to be so, as to two propositions stated by him. These are:

1st. That the Sherman law condemned any combination that put an end to an existing competition, and

2nd. That the Sherman act condemned any combination that tended to monopoly.

If it be true that the Sherman law condemns all combinations that end existing competitions then the Sherman law has put an end to all progress. Whenever a new order of things arises from the introduction of new devices or new ideas in business methods, competitions that theretofore existed are necessarily ended and new competitions arise in their places. A combination may propose to put an end to existing competition but it may intend to put in its place another competition that will be far more to the interests of the public and of everyone concerned. Aviation may destroy two competing railroads and cause their tracks to turn to two streaks of rust but are we to be deprived of aviation because it may produce this result?

Competition must be left free, even if a competitor is destroyed and even though it ends countless competitors. The public safety is in preventing anyone, rich or poor, from making an improper use of his power. Justice Harlan's doctrine is the doctrine of the labor union which confines the fastest to the speed of the slowest and opposes the introduction of new devices because it may throw many employees out of work. Justice Harlan says Congress may enact such measures as will prevent free competition being interfered with. This is undoubtedly so, but it is one thing to say free competition shall not be interfered with and quite another thing to say that an existing competition shall not be destroyed.

The one proposition is directly opposed to the other, as free competition may necessarily result in the destruction of an existing competition. The destruction of an existing state of competition may be necessary to carry forward a great enterprise of the utmost importance to mankind, but the freedom of all men to compete with each other to the death must not be interfered with in the smallest degree.

Of what moment is it if an existing competition is suppressed or if many existing competitions are suppressed, if prices of the commodities are kept at the normal. It is nothing to the public whether it gets its supplies from one man or one hundred men, if the price is no higher than it should be.

Take the United States Steel Corporation, for instance. When it was formed it suppressed many plants and ended many competitions, but if it can supply whatever is needed without these suppressed plants, then the suppressed plants were not required and to keep them in operation in competition with each other, was simply to force destructive competition, and if the United States Steel Corporation has kept prices at the normal, how is the public hurt? But if the great concern raises prices above the normal, then there will certainly be new competitions, if the government makes it safe to compete. It is preposterous for the government to take the ground that it is going to forbid the disuse of useless plants and force them to remain in competition with each other. That is a subject which must be governed by business considerations; at bottom by the law of supply and demand. The thing to do therefore is not to interfere with the freedom of men, to conduct their business in the way that suits them, but for the government to stand between the strong and the weak and force the strong to respect the rights of the weak.

Justice Harlan's second proposition is just as harmful as his first one. Our laws do not condemn a status that tends to monopoly. They condemn monopoly as monopoly is explained above but not a tendency to monopoly. A business is tending to a monopoly from the day it starts. The parties engaged intend from the outset to get control of as much of the business as they can control, but they are never monopolists in the eye of the law until they control so much of it as enables them to unduly raise prices. To say that a tendency to monopoly is condemned is not far from Mr. Bryan's idea, that a corporation should not be allowed to obtain control of more than 25 per cent of a business.

It is a very great error to suppose the independent cannot compete with the trusts. The trust is full of water and it must sell at a price that will enable it to pay dividends upon this water. But the capital of the independent is gold dollars and it must pay dividends on them alone. The independent has an advantage also in proclaiming that his goods are not made by a trust, which counts for much when all other things are equal. The independent had also much rather compete with one rival especially if its capital is largely made up of water, than with twenty rivals all of whom have gold dollars for their capital. This is a very imperfect statement of the argument upon this subject. Reference is made to the article above mentioned for a fuller statement of it.

Winding Up of the Concerns.—In the Tobacco case the Supreme Court directed the Circuit Court to bring about a complete termination of the old condition of things and to establish a new condition that will be in harmony with the law and its opinion. It is constantly asked how can this be possibly done? Nothing easier or simpler. The circuit court will order the company to sell at public auction all of its holdings in other companies. It will then select the companies that have been merged into the American Tobacco Company and order all property on the premises of each to be sold at public auction. It will then require the American Tobacco Company to sell its own property at public auction until it has trimmed it down to a size that will disable it to operate harmfully in the future. It

ST. LOUIS PUBLIC LIBRARY READING ROOM

will then distribute the purchase money to those entitled to it. It will then turn the American Tobacco Company loose for business but with a string tied to it and permission to anyone to come forward at any time and show that the company is lapsing into its old unlawful ways.

WILLIAM L. ROYALL.

Richmond, Va.

BILLS AND NOTES—NEGLIGENCE OCCASIONING FORGERY.

S. WEISBERGER CO. v. BARBERTON SAVINGS BANK CO.

Supreme Court of Ohio, March 28, 1911.

95 N. E. 379.

(Syllabus by the Court.)

W., being indebted to R., whose place of business W. knew to be 48 Walker street, New York City, drew a check on his local bank of deposit in favor of R. for the amount of the debt, without designating therein his place of business, and inclosed the check with a letter in an envelope which he through mistake addressed to R., 48 Walker street, Cleveland, Ohio, and caused the envelope and contents so addressed to be mailed in the usual way, and it arrived in Cleveland in due course of mail, where the letter carrier found no one of that name on Walker street of that city, but found a man whose name was R. on Henry street, and to whom the carrier delivered the letter. He opened it and took possession of the check, and by indorsing the name R. on the back thereof obtained the cash from an acquaintance, who indorsed and deposited said check in his bank of deposit in Cleveland. The latter bank indorsed it over to another bank in the same city, guaranteeing prior indorsements, and this bank indorsed it payable to any bank or bearer, guaranteeing all prior indorsements, and in this condition it was presented to the drawee bank, and by it paid and charged to W.'s account, it having no knowledge of said mistake in addressing the letter. W. afterwards discharged his debt to the New York creditor by other means, and brings suit against the drawee bank to recover the amount of the check so charged to his account.

Held, the drawer of the check was first in fault, and as his negligence contributed directly to its wrongful and fraudulent appropriation, he is not entitled to recover.

The parties to this case are corporations doing business in the village of Barberton, Summit county, Ohio; the plaintiff in error being engaged in mercantile business, and the defendant in error engaged in a general banking business. The former brought suit against the latter, and for cause of action alleged in substance: That on or about January 13, 1906, and prior thereto, it had deposited with the said bank an amount of money in excess of $122.13, which sum was on deposit on said day subject to check in excess of any liability or claim against the same. That on that day the plaintiff drew a check upon the bank for the sum of $122.13, payable to Max Roth of New York City. That said check so drawn was fraudulently indorsed in blank by a person purporting to be Max Roth of Cleveland, Ohio, and that said check so fraudulently indorsed was delivered to one B. Schoenfeld, and by him indorsed in blank and deposited with the Cleveland Trust Company, of Cleveland, Ohio, and by the latter said check was indorsed with the following indorsements: "Pay to the Union National Bank of Cleveland, or order; prior indorsements guaranteed. The Cleveland Trust Co., Perry Office, C. O. Patch, Secy.-Treas." The said check was further indorsed by the Union National Bank of Cleveland, as follows: "Pay to the order of any bank or bearer; all prior indorsements guaranteed. Jan. 10, 1906. Union National Bank, Cleveland, Ohio, E. R. Fancher, Cashier." It is alleged that said check, with the forged indorsement thereon of Max Roth, and with the other indorsements thereon as stated, was wrongfully accepted and paid by the defendant bank, at Barberton, on or about the 23d day of January, 1906, and afterwards was wrongfully and without authority from the plaintiff charged against its account with said defendant bank. It is alleged that when plaintiff discovered the forged indorsement and the wrongful payment aforesaid, and on or about February 7, 1906, plaintiff demanded that defendant correct said account, and not charge said check against its account, which defendant refused to do, and refused to pay the plaintiff the amount of the check so wrongfully paid, and it prays judgment for the amount.

The answer admits most of the allegations made in the petition, but denies that said check was made payable to Max Roth, of New York City. The answer avers that said check was indorsed by Max Roth, and by the said Max Roth delivered to one B. Schoenfeld, and by him was indorsed in blank and deposited with the Cleveland Trust Company, of Cleveland, Ohio, and that this trust company indorsed the check to Union National Bank of Cleveland, or order, and it indorsed the same payable to the order of any bank or bearer, on the day and in the form alleged in the petition. The Union National Bank presented the check so

indorsed to the defendant bank, at Barberton, for payment, and it paid the same and charged it to plaintiff's account. The defendant further alleges that said check was paid to Max Roth, of Cleveland, Ohio, without any information or knowledge to show that it was paid to any one else, and that, if said plaintiff has been damaged, it occurred by reason of its own negligence in misdirecting said check and mailing the same to Max Roth, at Cleveland, Ohio, instead of Max Roth, of New York City. It is then averred that plaintiff did not act promptly when it discovered its mistake and inform defendant in time to protect itself against any fraud committed.

The new matter of the answer is denied by reply. The parties waived a jury and submitted the case on the facts to the court, who found for the defendant. A judgment on the finding was affirmed by the circuit court. Error is prosecuted here to reverse both judgments.

PRICE, J.: (after stating the facts as above). At the trial in the court of common pleas, some of the facts were agreed upon, and they show that, at the date of the check mentioned in the petition, the plaintiff in error was indebted to one Max Roth, of New York City, in the sum of $122.13, and that his place of business at that time was No. 48 Walker street of that city. To pay the above indebtedness, the plaintiff in error, on the 13th day of January, 1906, drew its check for said amount, on the defendant in error, in favor of and payable to Max Roth, in the following words: "Barberton, O., 1—13, 1906. Pay to the order of Max Roth ($122.13/100) one hundred twenty-two 13/100 dollars. The S. Weisberger Co. To the Barberton Savings Bank, Barberton, Ohio." This check, with a letter signed by the firm, was placed in an envelope, which was addressed to Max Roth, 48 Walker street, Cleveland, Ohio, instead of Max Roth, 48 Walker street, New York City. The letter, so addressed and containing the check, shortly after it had been mailed to Cleveland, was delivered by the post office authorities to one claiming to be Max Roth, who lived or roomed on Henry street in the city of Cleveland. It appears that his name was Max Roth, but not the Max Roth to whom plaintiff was indebted, and whose place of business was 48 Walker street, New York City. The Cleveland Max Roth, to whom the letter containing the check was delivered, took the check to a saloon keeper in Cleveland, with whom he was acquainted, and after indorsing his name, Max Roth, on the back of the check, received the cash for the same from the saloon keeper, whose name is B. Schoenfeld. The latter indorsed and delivered it to the Cleveland Trust Company, which later indorsed and deposited it with the Union National Bank of that city, by which the check was presented to defendant bank for payment, and it was paid and charged to the account of plaintiff. It never reached the Max Roth of New York for whom it was intended, and plaintiff, afterwards and by means of another check, discharged its indebtedness to the New York creditor. As between the parties hereto, who should bear the loss sustained?

It is not necessary that we consider the many authorities presented by the plaintiff in error concerning the liability of a bank to one of its depositors for paying a forged check, nor to discuss the general rule that such bank is bound to know the signature of its depositor. Those authorities may be regarded as sound on the facts of each case there found, and still the judgment of the lower court be free from error. There is one view of this case sufficiently clear to sustain the judgment, without conflict with any authority cited in the brief or oral argument. It stands out boldly in the plaintiff's case—in its petition and in its evidence—that it was first at fault, if not first and solely negligent. It was a business concern, keeping an account with the defendant bank. It knew that its creditor, Max Roth, resided in New York City, doing business at 48 Walker street, and, desiring to pay its debt to him, drew the check payable to him, not designating therein either the place of residence or business, and thoughtlessly or negligently inclosed it with a letter in an envelope which it addressed to Max Roth, 48 Walker street, Cleveland, Ohio, and, so addressed, the plaintiff caused it to be mailed. Bearing that address, the letter could not properly go to New York City, but could and properly did go to the city of Cleveland. Perhaps there is no Walker street in Cleveland; but the postal service, after diligent effort, found a Max Roth, or a man who claimed to be of that name, and the letter containing the check was delivered to him. Up to this point of time, no one connected with the check was negligent, except the plaintiff, unless it be the letter carrier who delivered the letter. The act of the Max Roth of Cleveland, who received the letter, was criminal, and he forged the name of the real party for whom the check was intended by indorsing his name thereon.

The carelessness of the plaintiff put it within the power of the Cleveland man to perpetrate a fraud and obtain the proceeds of the check, which he did at the hands of Schoenfeld, his acquaintance. Then it took the customary course on its way to the bank of defendant upon which it was drawn. Schoenfeld,

believing the indorsement of the Cleveland acquaintance legitimate, deposited the check in his bank of deposit, having indorsed his name on the back thereof. This bank indorsed and transferred it to the Union National Bank, guaranteeing prior indorsements; and it in turn indorsed it payable to any bank or bearer guaranteeing all prior indorsements. These were Cleveland banks, which made the indorsements and transfers; but it is not alleged in the petition that the defendant bank had any information or knowledge as to the residence or place of business of Max Roth, the plaintiff's creditor, and therefore the location of these indorsing banks was not calculated to put the defendant on inquiry or excite its suspicion. They had severally guaranteed prior indorsements. It was not practicable for the defendant to interview Max Roth, to ascertain whether he was the lawful holder of the check. While it is true that a forged indorsement transfers no title to the check, we cannot avoid a comparison of the negligent conduct of the plaintiff with the apparent good faith of the defendant, acting as it did under the circumstances narrated. The misdirected letter was the source of possibilities that became realities in this case. In other words, the plaintiff was first at fault, and its mistake made possible what in fact has transpired. If we admit, as we do, the ordinary rule that a bank is bound to know the signature of its depositor, it is a rule to protect the rights of the depositor. But where his carelessness has contributed directly to the deception of the bank, he may not be in position to enforce such general rule.

In the case at bar, it appears that neither the depositor nor the bank intended to commit any wrong, and we may apply a rule the substance of which is that, where one of two innocent parties must suffer because of a fraud or forgery, justice imposes the burden upon him who is first at fault and put in operation the power which resulted in the fraud or forgery. We decide this case on its own peculiar facts, and make no search for or examination of reported cases, and affirm the judgment of the lower court.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, JOHNSON, and DONAHUE, JJ., concur.

NOTE.—*Negligence of Drawer Occasioning Forgery so as to Justify Drawee in Paying Draft.*—It is not certainly to be deduced from the principal case that the payee of the check in question could not have recovered, as the court bases its judgment on the fault of the drawer, thus not permitting him to stand in the shoes of the payee. Nevertheless the decision may be dissented from, reasonably, upon the ground, that the bank sets up a spurious voucher and that it ought to have been rejected as being no voucher at all. Investigation has revealed to us only three cases very much resembling the principal case, all disagreeing with it and we make copious extracts from them.

In Meade v. Young, 4 T. R. 28, the case was an action by the indorsee of a bill of exchange against the acceptor. It was drawn at Dunkirk, Scotland, on the defendant in London, payable to "Henry Davis or order." It was mailed to the payee and got into the hands of another Henry Davis, who presented it for acceptance and it was accepted. When this Davis applied to plaintiff to discount it, he inquired of defendant whether or not it was his acceptance. He said it was and assured the plaintiff it was a good bill. Then plaintiff discounted it, not knowing the Davis from whom he took it. No fraud was imputed to plaintiff or the acceptor.

On the trial, defendant offered evidence to show that the indorser was not the Davis in whose favor the bill was drawn, but Lord Kenyon rejected the evidence and plaintiff had a verdict.

King's Bench Judges Ashhurst, Buller and Grose, concurred in separate opinions in holding that the evidence should have been received.

Ashhurst, J., said: "In order to derive a legal title to a bill of exchange, it is necessary to prove the handwriting of the payee; and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery; and no title can be derived through the medium of a fraud or forgery."

Buller, J., said: "If we are to inquire whether any laches were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more at fault than any other person, in advancing money to H. Davis, who was a total stranger to him. But, without going into any such inquiry, I am of opinion that it is incumbent on a plaintiff, who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable. * * * It was argued that Christian (the drawer) was guilty of negligence, in not describing more particularly the payee; but I know of no authority, which requires that to be done. This bill was drawn in the common form, payable to 'H. Davis or order,' and the drawer could not foresee that it would get into the possession of any other H. Davis. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill; and it cannot make any difference whether such stranger bear the same name with the real payee or not, for no person can give title to a bill but he to whom it is made payable."

Grose, J., reasoning along the same lines, also said: "If this decision will prove a clog on the circulation of bills of exchange, I think it will prove less detrimental to the public, than permitting persons to recover through the medium of a forgery. * * * I agree also with my brother Buller, that this decision will be more convenient to the public, because then the plaintiff will prosecute the person, who indorsed to him, for the forgery."

In Graves v. The American Exchange Bank, 17 N. Y. 205, the action was by the payee of a bill of exchange, against drawee bank for its conversion. The plaintiff claimed that his debtor purchased a New York draft from a banker. Plaintiff resided at Mendota, Ill., and the draft was mailed to him at La Salle, Ill. After mailing the letter, the debtor learned he had misdirected it, and procured the La Salle postmaster to forward it to Mendota. But the original address caused the letter to be given to another of the same name as plaintiff, whose post-office address was La Salle, the two towns being fifteen miles apart. This party sold the draft at La Salle and by him it was indorsed to others and paid in the ordinary course of business. The only description of the payee was by his name.

Comstock, J., speaking for the majority, affirmed a directed judgment for plaintiff, citing Mead v. Young, *supra*.

The error of misdirection was held to cut no figure in this case, because it had been corrected and it was said: "It is well settled that a forged indorsement does not pass title to commercial paper negotiable only by indorsement, and does not justify the payment of such paper." * * * It follows that the true owner of the draft in question had a right to claim it wherever he could find it."

Roosevelt, J., dissenting, said: "The payee had no designation but his name; none at all events was given by the drawer. The bank in good faith paid the draft to a person presenting it with the indorsement of Charles F. Graves, a genuine indorsement, but not the indorsement, it is said, of the genuine Graves. Which of the two, under these circumstances, should bear the loss—the drawer who carelessly omitted all designation, or the drawer who innocently paid the wrong person in consequence of such omission? As between these parties, the loss, it seems to me, should fall on the former. Nor do I perceive that the payee occupies any better position. Hurd was his debtor, and bought the draft to remit in payment of the debt. Hurd directed the form. He did nothing to supply the drawer's omission, but aggravated the error by another of his own. * * * He candidly admits he 'made a mistake in directing the letter.' He thus by his own act put the draft in the hands of the La Salle Graves, and held out the La Salle Graves as the real payee. Can he complain, then, that the Exchange Bank recognized his indorsement?"

In Bank of Commerce v. Domenico Ginocchio, 27 Mo. App. 661, the facts show that defendants purchased from a St. Louis bank a draft payable to their own order and they indorsed, "Pay to the order of Harry Jones," and mailed it in a letter addressed, "Harry Jones, Kansas City, Mo." It came into possession of another Harry Jones, who was known to the plaintiff, and, upon his indorsing it, plaintiff bank paid him full face value for it.

It being ascertained that the true Harry Jones had not received the draft, a duplicate was issued and paid by the New York bank on which it was drawn. The original was refused payment and plaintiff bank sued the defendants.

It was claimed by the petition that there was negligence in mailing said draft, as the true Jones had an address by street and number in Kansas City, and defendants well know or might have ascertained there were several persons of the name in Kansas City.

A demurrer was sustained to the petition as not stating any cause of action. This ruling was affirmed, the St. Louis Court of Appeals, through Thompson, J., saying: "Confessedly there is no controlling authority upon which we can decide this case," but the opinion relies on Mead v. Young, *supra*. The court also says: "It is more just to require the banking community so to act in the conduct of its business as to protect themselves against losses. A banker is not bound, like a common carrier, to receive the commodities which he handles from anyone who may tender them, but he may ordinarily protect himself against frauds of this kind by refusing to purchase negotiable paper of strangers, and by confining himself in such purchases to customers of known honesty or of good reputation. The case is governed by the principles which judges and lawwriters class under the head of proximate and remote cause. * * * We have no difficulty in saying that the damage stated in this petition must be excluded from the category of damages for which the law gives a right of action."

This last case is quite on all fours with the principal case, and we think it can hardly be claimed, that the negligence in the principal case was at all greater than in that.

What Judge Thompson thinks a good reason for not protecting a bank under such circumstances is very persuasive, being, however, only elaboration of what is advanced in Mead v. Young.

It seems to be regarded decidedly as negligence to purchase such paper from a stranger, but it would be no more negligence to purchase from one not of good reputation. But, if the purchase is from one of good reputation, why should the purchaser be given additional protection?

If the commercial world is content not to require fuller designation than is conveyed by the mere name of a payee it ought to be content to abide by the consequences of its choice.

C.

CORAM NON JUDICE.

AUTO-INTOXICATION AND ACCIDENT INSURANCE.

Certainly in this day of much litigation growing out of the recklessness of the chauffeur and the activity of the human mind in inventing methods to circumvent the drastic liquor laws of some of the states, the combination auto-intoxication, in connection with an accident would convey to the average reader either an automobile casualty or a carouse. But it is neither; it is a disease. It makes its appearance in an action by a widow on a policy on her husband insuring against death from bodily injury from external violent and accidental means. The deceased was a physician and while getting out of his buggy at his home, fell to the ground and hurt himself. He did not leave his home again, but died in about ten weeks, having been ill all the time. The claim that the fall was the cause of his death was supported by two physicians, who testified at the trial. The first, Dr. H., said that he was called to visit the deceased two days after the

fall and found him very ill, and his examination continued as follows:

"The deceased said to me that he had had a fall out of his buggy, and that he thought it shook him up worse than the other fall. He had reference to the fall he had when he fractured his rib, and for which I didn't attend him, but I saw him socially during that time, and this was the fall he was referring to when he said this last fall shook him up worse than the other fall. Q. What causes auto-intoxication? A. Anything that will prevent nature from taking care of the products entering the alimentary canal, and thus allowing it to ferment in the system; anything that will prevent the liver from secreting its bile, and the stomach from doing its part; anything that would prevent any of those would contribute to auto-intoxication. In this case the most satisfactory explanation of the case was this history of the fall that he had at that time which shook him up and his alimentary tract was not doing the work, and we were never able to make it do the work to amount to anything at all. Q. I will ask you whether or not the fall of which he told you, in your opinion, produced this auto-intoxication? A. In my judgment that was the cause. Anything that would shake up the nervous system to such an extent as to paralyze would cause these organs to go on a strike, and we were never able to make them work any more."

The second expert, Dr. D., when asked to explain to the jury what auto-intoxication was, said: "Auto-intoxication is a condition wherein a man is poisoned by products which have formed in his own body. Auto means by itself; intoxication, a condition of poisoning. An auto-intoxication means the absorption of these poisons that are generated in the body of the man. They are not generated from the outside, but are generated from the inside, and they get into his circulation and interfere with his metabolism. Metabolism is that change that is constantly taking place in a man's body. Now, auto-intoxication can be brought on by an alteration of the metabolism. Frequently it comes by acute indigestion. Some condition that would tend to lower the vitality and make the man a fit subject for auto-intoxication. It can be produced by bodily injuries, or anything that would tend to lower the vitality of a man." Notwithstanding this learned testimony, the court of appeals ruled that the death was caused by disease and not by accident, and reversed a judgment for the plaintiff in the court below. (Aetna Ins. Co. v. Bethel, 131 S. W. 525.)—American Law Review.

BOOK REVIEWS.

THE MODERN LAW OF EVIDENCE, VOL. 2.

The second of the four volume series by Charles F. Chamberlayne, of the Boston and New York bars under the above title, is devoted to "Procedure."

Procedure in the sense used here by the author is evidence regarded from an administrative standpoint. Thus the subjects treated of in this volume are "Burden of Proof"; "Burden of Evidence"; "Presumptions, Inferences of Fact"; "Presumptions of Law"; Pseudo-Presumptions"; "Administrative Presumptions;" "Admissions" of various character; "Offers of Compromise"; "Confessions," and "Former Evidence."

This plan of a book, as part of the general scheme, is in itself attractive and suggests facility of use, a consideration more than ever before important in a law book. If one cannot put his finger easily on the place in a text-book he desires to find and know when he has done so that this is all he need consult it for, that book loses much of its practical value.

We dwelt somewhat more at length on the general merits of this work in our review of volume 1, at page 446 of 72 Cent. L. Journal, and what was there said need not be here repeated.

Two volumes of this work have already been published and sell for $7.00 per volume.

This work is published by Matthew Bender & Company, Albany, New York, 1911.

AMERICAN STATE REPORTS, VOL. 137.

This volume shows cases selected from sixteen states with many such elaborate annotations as are well-known features of this work, besides the usual brief notes with citation of authority at the end of cases other than those extensively annotated. Of lengthy annotations we find the subjects "Personal Liability of Judges and Judicial Officers"; "Waiver of the Vendor's Lien"; "Mortgages, Description of Property"; "Estoppel of County or Municipal Corporation to Contest Legal Claims or Expenditures"; "Chattel Mortgages—the Effect of Failure to Execute and Record as Prescribed by Statute"; "Duties of Tenant for Life to the Remainderman and Reversioner"; "Proofs of Death in Cases of Accident and Life Insurance"; "Contempt Proceedings to Enforce Payment of Alimony"; "Actions Maintainable by the Mortgagor of Chattels Against Third Persons After Condition Broken"; "Vagrancy," and "Validity of Sales Under a Satisfied Judgment."

It is unnecessary to speak in detail of any of these annotations or any of these notes. They are what have given to these reports their especial value, though the excellent discrimination of their editors in selection of cases should not be underestimated.

This volume is from Bancroft Whitney Company, San Francisco, 1911.

HUMOR OF THE LAW.

A Canadian lawyer tells this story:

A bailiff went out to levy on the contents of a house.

The inventory began in the attic and ended in the cellar. When the dining-room was reached, the tally of furniture ran thus:

"One dining-room table, oak.

"One set chairs (6) oak.

"One sideboard, oak.

"Two bottles of whiskey, full."

Then the word "full" was stricken out and replaced by "empty," and the inventory went on in a hand that straggled and lurched diagonally across the page until it closed with:

"One revolving doormat."—Everybody's.

"The Hague has done much toward promoting peace in the world."

"Yes," replied Miss Cheyenne, "and so has Reno."—The Washington Star.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Alabama.....9, 20, 21, 53, 83, 111, 131, 134
Arkansas.....90, 121, 122
California.....2, 81
Colorado.....27, 62
Connecticut.....48, 52, 63, 72
Delaware.....38, 64, 125
Florida.....66
Georgia.....11, 32, 77, 88, 101
Idaho.....5, 47, 79
Indiana.....55, 56, 78
Iowa.....25, 41, 80, 108, 113, 120
Kansas.....33, 58, 70, 71, 75, 96, 110
Kentucky.....23, 28, 42, 59, 84, 95, 109
Louisiana.....102
Maine.....13, 50, 68
Maryland.....54, 85
Massachusetts.....92, 105, 133
Michigan.....3, 61, 107, 112
Montana.....98, 128
Nebraska.....51, 94, 114
New Hampshire.....30
New Jersey.....46
New York.....86, 91, 93, 116, 124, 126
North Carolina.....22, 103, 132
Ohio.....24, 49
Oklahoma.....17
Oregon.....1, 19, 82, 104
Pennsylvania.....16, 29, 37, 40, 60, 89
South Carolina.....7, 69, 127, 129
Texas.....14, 67
United States C. C.....43
U. S. C. C. App....12, 18, 26, 31, 57, 65, 73, 99, 119
United States D. C.....8, 10
Utah.....35, 74, 76
Vermont.....45
Virginia.....87, 118
Washington.....6, 15, 106, 115, 123
West Virginia.....36, 44, 100
Wisconsin.....4, 34, 39, 97, 117, 130

1. **Abandonment**—Restoration to Common Stock.—Property purposely abandoned by the original owner is restored to the common stock, and becomes the property of him who first discovers and takes it into his possession.—Robertson v. Ellis, Or., 114 Pac. 100.

2. **Account Stated**—Misrepresentation.—Any concealment or misrepresentation, where relation of confidence and trust exists, held to amount to fraud, invalidating an account stated.—Vance v. Supreme Lodge of Fraternal Brotherhood, Cal., 114 Pac. 83.

3. **Adverse Possession**—Outstanding Claims.—One in possession of land, claiming to own it, may buy any outstanding claims without abandoning or impairing his own or acknowledging the validity of the outstanding claims.—Ripley v. Miller, Mich., 130 N. W. 345.

4. **Assignments for Benefit of Creditors**—Residue.—A debtor and his creditors held authorized to agree to a transfer of his property to a trustee either absolutely for the benefit of the creditors or subject to a reversion of the residue after the creditors have been paid.—McMillan v. Holley, Wis., 130 N. W. 455.

5. **Attorney and Client**—Deceased Client.—Where party to action dies after judgment, his attorney must obtain authority from his legal representative before he can prosecute apeal.—McCornick v. Shaughnessy, Idaho, 114 Pac. 22.

6.——Employment.—An heir employing an attorney to render services for all the heirs held not liable for the entire fee if the coheirs repudiate the contract.—Abel v. Hansen, Wash., 114 Pac. 182.

7. **Bail**—Forfeiture.—The court may, on satisfactory showing, in its discretion, continue a hearing on forfeited recognizances, or grant orders for a further amended return, or remit the whole or any part of the forfeiture.—State v. Edens, S. C., 70 S. E. 609.

8. **Bankruptcy**—Assets.—The interest of a stock broker in a stock pool constitutes property, within the bankruptcy act.—In re Lathrop, Haskins & Co., D. C., 184 Fed. 534.

9.——Composition.—In view of Bankr. Act a debt created by a loan to the bankrupt by a creditor to enable the bankrupt to comply with the terms of a composition held not discharged by the confirmation of such composition, so that it could be thereafter enforced.—Zavelo v. J. S. Reeves & Co., Ala., 54 So. 654.

10.——Contempt.—In a proceeding for contempt in a district court against a bankrupt for failure to comply with an order of the referee to turn over money or property to his trustee, such order, not appealed from, is conclusive of the fact that at the date of its entry the bankrupt had the money or property in his possession or under his control—In re Frankel, D. C., 184 Fed. 539.

11.——Intervention in State Court.—A trustee in bankruptcy held empowered to intervene in the state court, and contest the validity of chattel mortgages executed by the bankrupt, and assert rights thereunder.—Neill v. Barbaree, Ga., 70 S. E. 638.

12.——Judgments.—Where a suit to foreclose a mechanic's lien was permitted, notwithstanding the bankruptcy of the owner of the property, to continue to judgment, the judgment would not be regarded as void in the bankruptcy proceedings, though the bankruptcy court might exercise certain revisory powers with reference thereto.—Hobbs v. Head & Dowst Co., C. C. A., 184 Fed. 409.

13. **Banks and Banking**—Notice.—Where chattel mortgagor deposits proceeds of sale of mortgaged property with a bank, and it is notified of the character of the deposit, it cannot apply it to mortgagor's debt to bank.—First Nat. Bank v. Eastern Trust & Banking Co., Me., 79 Atl. 4.

14. **Bills and Notes**—Attorney Fees.—A provision in a note for attorney's fees held to be liquidated damages and not a penalty.—First Nat. Bank v. Robinson, Tex., 135 S. W. 372.

15.——Failure of Consideration.—No failure in consideration for a note given in consideration of an agreement to furnish water for irrigation can occur until after the date fixed for furnishing water.—Moyses v. Bell, Wash., 114 Pac. 193.

16.——Signing in Blank.—Under the negotiable instruments law a person signing a note in blank before delivery held liable as indorser.—In re Alldred's Estate, Pa., 79 Atl. 141.

17. **Boundaries**—Agreement Fixing.—An agreement between joint owners establishing a disputed boundary is conclusive upon them

and all parties claiming under them.—Patterson v. Meyer, Ok., 114 Pac. 256.

18. **Brokers**—Commission.—Commissions are not earned by a broker by his procuring a purchaser who is irresponsible and insolvent.—Robertson v. Allen, C. C. A., 184 Fed. 372.

19. **Carriers**—Baggage.—The liability of a carrier for personal baggage of a passenger held governed by the rules applicable to the liability of carriers of goods.—Wells v. Great Northern Ry. Co., Or., 114 Pac. 92.

20.——Bill of Lading.—The payee of a draft with bill of lading attached held not liable to the drawee-consignee for a breach of contract of sale by the drawers-consignors.—Cosmos Cotton Co. v. First Nat. Bank, Ala., 54 So. 621.

21.——Contributory Negligence.—That a street car passenger was riding on the platform when injured in a collision held, to raise a rebuttable presumption of contributory negligence.—Alabama City, G. & A. Ry. Co. v. Ventress, Ala., 54. So. 652.

22.——Employee as Passenger.—An employee of a lumber company returning from his work on its train on its logging road held a passenger as regards liability for his injury.—Roberson v. Greenleaf Johnson Lumber Co., N. C., 70 S. E. 630.

23.——Insult to Passenger.—Under the separate coach law, held, the carrier was not liable for a white passenger entering without notice to employee the coach for negroes, and insulting a passenger therein.—Hale v. Chesapeake & Ohio Ry. Co., Ky., 135 S. W. 398.

24.——Market Value.—A shipper may recover as damages decline in market value between time when freight should have been delivered and when it was delivered.—Wyler Ackerland & Co. v. Louisville & N. R. Co., Ohio, 94 N. E. 423.

25.——Riding on Pass.—Where plaintiff was injured while riding on defendant's railroad on a pass procured by false representations, she was a trespasser.—Denny v. Chicago, R. I. & P. Ry. Co., Iowa, 130 N. W. 363.

26.——Safety of Passenger.—A railroad company is under obligation to take due care to secure the safety of a passenger who is on its platform to board its train.—Pennsylvania R. Co. v. Stockton, C. C. A., 184 Fed. 422.

27.——Union Station.—Owner of a union station to which he invites the traveling public is liable for injuries to them for an unsafe condition of its premises.—Union Depot & Ry. Co. v. Londoner, Colo., 114 Pac. 316.

28.——Warehouseman.—A carrier must show offer of delivery of goods before its liability can be changed from that of a carrier to that of a warehouseman.—Louisville & N. R. Co. v. Gay, Ky., 135 S. W. 400.

29. **Conspiracy**—Overt Act.—At common law no overt act is necessary to constitute a conspiracy.—Commonwealth v. Richardson, Pa., 79 Atl. 222.

30. **Constitutional Law**—Construction. — By universal acquiescence and approval the meaning of the Constitution is established.—In re Opinion of the Justices, N. H., 79 Atl. 31.

31.——Corporations.—In the absence of fraud the courts cannot review the action of a corporation, taken in accordance with its charter, in ordering an assessment on its unpaid stock.—Car Trust Inv. Co. v. Metropolitan Trust Co. of New York, C. C. A., 184 Fed. 443.

32.——Right to Attack Statute.—Where it appears that a judgment is void for failure to comply with a statute properly construed, an attack upon the constitutionality of the statute will not be considered.—Singer v. Middleton, Ga., 70 S. E. 662.

33. **Contracts**—Duress.—Ordinarily it is not duress to sue or threaten to sue to enforce a valid obligation.—United States Banking Co. v. Veale, Kan., 114 Pac. 229.

34.——Seals.—An instrument formally executed under seal imparts a sufficient consideration to support it.—Walterman v. Village of Norwalk, Wis., 130 N. W. 479.

35.——Waiver of Forfeiture.—A waiver of a forfeiture of a contract may be express or implied.—Loftis v. Pacific Mut. Life Ins. Co. of California, Utah, 114 Pac. 134.

36. **Corporation**—Accommodation Sign. — A manager of a corporation has no implied authority to sign its name as an accommodation indorser, surety or guarantor.—Haupt v. Vint, W. Va., 70 S. E. 702.

37.——Insolvency.—When an act has been done in fraud of the creditors of an insolvent corporation, its receiver may sue for their benefit, though the defense set up might be valid as against the corporation itself.—Lyons v. Benny, Pa., 79 Atl. 250.

38. **Criminal Law**—Good Character.—The good character of accused is to be taken in connection with all other evidence.—State v. Reese, Del., 79 Atl. 217.

39.——Waiver.—Accused may waive his constitutional right to meet witnesses face to face.—Smith v. State, Wis., 130 N. W. 461.

40. **Damages**—Earning Power.—In action for personal injuries, profits derived from business may be considered as measuring earning power.—McLane v. Pittsburg Rys. Co., Pa., 79 Atl. 237.

41. **Death**—Damages.—In an action for injuries causing death, an instruction on the question of damages held not erroneous for failure to take into consideration what the deceased would have spent had he lived.—Neal v. Sheffield Brick & Tile Co., Iowa, 130 N. W. 398.

42.——Presumption of Care.—One suing for negligent or wrongful death need not show that decedent exercised ordinary care for his own safety.—Johnson v. Westerfield's Adm'r., Ky., 135 S. W. 425.

43.——Right of Action.—An action for death of a railroad employee under federal employer's liability act, could not be brought by the decedent's widow, or other beneficiary, but only by his personal representative.—Thompson v. Wabash R. Co., C. C., 184 Fed. 554.

44. **Deeds**—Consideration—One dollar recited in a deed is a sufficient valuable consideration.—Lovett v. Eastern Oil Co., W. Va., 70 S. E. 707.

45.——Deaf Mute.—A deaf mute may possess sufficient capacity to execute a deed.—Brooks v. Mason, Vt., 79 Atl. 48.

46.——Recitals.—A recital in an ancient deed of an antecedent deed held to be presumptive proof of the existence of such deed.—McGrath v. Norcross. N. J., 79 Atl. 85.

47.——Undue Influence.—Influence gained by kindness and affection will not be deemed "un-

due influence."—Turner v. Gumbert, Idaho, 114 Pac. 33.

48. **Descent and Distribution**—Estoppel.—A conveyance by the heir of his interest in real estate before distribution of the estate stands good, either as an estopnel or an assignment.—Phelan v. Elbin, Conn., 79 Atl. 187.

49. **Divorce**—Alimony.—A wife appearing in a divorce case in another state held precluded by the judgment granting her alimony therein, so that she could not afterwards sue in Ohio to recover unpaid installments under a previous decree of alimony.—Gilbert v. Gilbert, Ohio, 94 N. E. 421.

50.——Annulment.—Where a court is induced by fraud to assume apparent jurisdiction of a divorce case, held that the divorce granted may be annulled.—Leathers v. Stewart, Me., 79 Atl. 16.

51.——Extreme Cruelty.—Unjustifiable conduct on the part of a husband may constitute extreme cruelty without physical injury.—Mills v. Mills, Neb., 130 N. W. 419.

52. **Dower**—Remainderman.—A remainderman suing for waste by a deceased dower tenant can show that she bore ill-will toward him during her occupancy.—Ferguson v. Rochford, Conn., 79 Atl. 177.

53. **Ejectment**—Tenancy.—That tenants had a better title than their landlord does not raise a presumption that their acceptance of a lease was induced by fraud.—Tapia v. Williams, Ala., 54 So. 613.

54. **Eminent Domain**—Abutter.—The right of access is the test of an abutter's right of action for obstruction of a street by a railroad.—Webb v. Baltimore & O. R. Co., Md., 79 Atl. 193.

55.—Judicial Question.—Whether a particular use in public or private as affecting the exercise of the right of eminent domain is a judicial question.—Westport Stone Co. v. Thomas, Ind., 94 N. E. 406.

56.——Public Use.—That the primary purpose of a lateral railroad is to serve a particular private enterprise held not conclusive against the public nature of the use, as affecting the right to condemn land therefor.—Westport Stone Co. v. Thomas, Ind., 94 N. E. 406.

57. **Estoppel**—Former Testimony.—A plaintiff testifying to facts within his knowledge before one jury should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false.—Smith v. Boston Elevated Ry. Co., C. C. A., 184 Fed. 387.

58.——Quitclaim Deed.—Quitclaim deed to land owned by maternal grandmother of the grantor held not to preclude the grantor from claiming a share under her grandmother's will.—Carter v. Mosier, Kan., 114 Pac. 226.

59. **Evidence**—Judicial Notice.—The court takes judicial notice that mortality tables are based on the expectancy of life of persons in good health, etc.—Chicago Veneer Co. v. Jones, Ky., 135 S. W. 430.

60. **Executors and Administrators**—Claims.—A claimant against an estate for wages for domestic services and board bills must overcome the presumption of payment by affirmative proof.—Winfield v. Beaver Trust Co., Pa., 79 Atl. 138.

61.——Compensation.—Services rendered in working decedent's farm or caring for his widow after his death are not provable against his estate, unless under contract with him.—Myron v. Myron's Estate, Mich., 130 N. W. 338.

62.——Limitations of Suits.—Where an action against an administrator was not brought within the year provided for the exhibition of claims, the satisfaction of the judgment was properly limited to decedent's uninventoried estate.—First Nat. Bank v. Hotchkiss, Colo., 114 Pac. 310.

63.——Sale of Land.—When real estate of an estate is sold to pay debts, the proceeds of the sale are not held for distribution, but to pay the creditors.—Phelan v. Elbin, Conn., 79 Atl. 187.

64. **False Pretenses**—Intent.—The intent to cheat is an essential element of the offense of obtaining property, etc., under false pretenses.—State v. Holden, Del., 79 Atl. 215.

65. **Frauds, Statute of**—Lost Memorandum.—The contents of a written memorandum of sale required by the statute of frauds, which has been lost, may be proved by parol, and proof of a statement by a defendant that an order for merchandise sent by letter had been accepted by mail is sufficient to establish such a written memorandum of sale, although the acceptance was not received by plaintiff.—Van Boskerck v. Torbert, C. C. A., 184 Fed. 419.

66.——Standing Timber.—A contract for sale of standing timber held within the statute of frauds precluding the bringing of an action at law upon it where not in writing.—Elsberry v. Sexton, Fla., 54 So. 592.

67. **Homicide**—Evidence.—Evidence that another confessed to committing a homicide is admissible for the defendant.—Pace v. State, Tex., 135 S. W. 379.

68. **Husband and Wife**—Agency.—That the title to a farm on which a husband and wife are living was in the wife held not to render the husband her agent in carrying on the farm.—Steward v. Church, Me., 79 Atl. 11.

69.——Limitations of Actions.—The disability of coverture of one cotenant does not extend to the protection of the interest of the others against the running of limitations.—Sibley v. Sibley, S. C., 70 S. E. 615.

70. **Injunction**—Elections.—The holding of an election under the initiative and referendum statute for irregularities in the petition, or because the ordinance to be submitted authorizes an ultra vires act, will not be enjoined.—Duggan v. City of Emporia, Kan., 114 Pac. 235.

71.——Prosecution Action Abroad.—Equity will restrain a party within its jurisdiction from prosecuting a suit in another state.—Mason v. Harlow, Kan., 114 Pac. 218.

72. **Insurance**—Benefit Society.—Courts will not interfere with the internal management of a benefit society unless the order itself neglects to perform its duty.—Kane v. Knights of Columbus, Conn., 79 Atl. 63.

73.——Subrogation.—The doctrine of subrogation which gives a fire or marine insurer, who has paid a loss to the assured, a right of action against any other person responsible for the loss, is equally applicable to cases of employer's liability insurance.—Travelers' Ins. Co. v. Great Lakes Engineering Works Co., C. C. A., 184 Fed. 426.

74.——Waiver of Forfeiture.—A waiver of forfeitures of a policy for nonpayment of premiums may be made by the agent of insurer.—Loftis v. Pacific Mut. Life Ins. Co. of California, Utah, 114 Pac. 134.

75. **Land**—Transfer by Delivery of Possession.—Actual possession of real estate may be transferred from one occupant to another by parol or bargain and sale with delivery.—Viking Refrigerator & Mfg. Co. v. Crawford, Kan., 114 Pac. 240.

76. **Landlord and Tenant**—Covenant.—Covenants for support are personal and unassignable without the express consent of the beneficiary.—In re Shearn's Estate, Utah, 114 Pac. 131.

77.——Relation by Contract.—A vendor and vendee of land could contract that, upon default in purchase-money notes, the relation of landlord and tenant should be considered as having existed through the year in which the default occurred.—Wilkins v. Fulcher, Ga., 70 S. E. 691.

78.——Vendor and Purchaser.—The tenant not being a party to, or having knowledge of, the contract of a vendor with the purchaser that the purchaser should have the rents prior to passing of deed, held not liable to the purchaser.—Jackson v. Creek, Ind., 94 N. E. 416.

79. **Libel and Slander**—Pleading Privileged.—For a party to be privileged in pleading free from liability as for libel he must act in good faith.—Carpenter v. Grimes Pass Placer Mining Co., Idaho, 114 Pac. 42.

80.——Privileged Statement.—Libelous or slanderous matter published in due course of judicial procedure is absolutely privileged, although made maliciously and with knowledge of its falsity.—Hess v. McKee, Iowa, 130 N. W. 375.

81. **Limitation of Actions**—Discovery of Fraud.—Where there is a fraudulent concealment of a cause of action, limitations held not to begin to run until discovery of the cause of action.—Vance v. Supreme Lodge of Fraternal Brotherhood, Cal., 114 Pac. 83.

82. **Lost Goods**—Title.—One employed to remove goods from a warehouse was entitled to money found by him and not belonging to the employer, as against the employer.—Roberson v. Ellis, Or., 114 Pac. 100.

83. **Malicious Prosecution**—Belief in Guilt.—One sued for malicious prosecution held required to show his belief in the guilt of accused.—Watson v. Cain, Ala., 54 So. 610.

84.——Probable Cause.—In an action for malicious prosecution, malice may be inferred from want of probable cause; but the want of probable cause cannot be inferred from malice.—Hudson v. Nolen, Ky., 135 S. W. 414.

85. **Mandamus**—Vacation of Office.—Mandamus is the only proper remedy where it is sought to compel the respondent, a city councilman, to vacate his office.—Hummelshime v. Hirsch, Md., 79 Atl. 38.

86. **Marriage**—Annulment.—Courts of New York will not annul a marriage contracted in New Jersey, though it would be annulled if in New York.—Cunningham v. Cunningham, 128 N. Y. Supp. 104.

87.——Presumption from Cohabitation.—Presumption of marriage arising from cohabitation apparently matrimonial, where the legitimacy of a child is involved, can be overcome only by cogent proof.—Suter v. Suter, W. Va., 70 S. E. 705.

88.——Presumption of Death.—A marriage between a man, whose wife had remained away over seven years, so as to be presumed dead, with another woman, held not unlawful, though it subsequently developed that the first wife was not dead.—Grand Lodge of Knights of Pythias v. Barnard, Ga., 70 S. E. 678.

89. **Master and Servant**—Assumption of Risk.—Employee injured because of changes in the construction of a machine made in his absence, and of which he had no knowledge, can recover therefor from the master.—Coll v. Westinghouse Electric & Mfg. Co., Pa., 79 Atl. 163.

90.——Contributory Negligence.—A master relying on the contributory negligence of a servant to defeat an action for his death necessarily assumes negligence on his part.—Ohio Handle & Mfg. Co. v. Jones, Ark., 135 S. W. 455.

91.——Fellow Servant Doctrine.—The Legislature has power to modify or abrogate the fellow-servant doctrine, the rule of contributory negligence, and, to a limited extent, the doctrine of assumed risk, as applied to injuries to servants.—Ives v. South Buffalo Ry. Co., N. Y., 94 N. E. 431.

92.——Presumption.—A servant has a right to expect his superintendent to use due care in managing the work.—Hutchinson v. Converse, Mass., 94 N. E. 453.

93.——Proximate Cause.—To make the insecurity of the tailboard of a coal wagon which gave way a proximate cause of the resulting injuries to the driver, it must have been probable that he would have been safely held if the tailpiece had not given way.—Mulligan v. Thompson Bros., 128 N. Y. Supp. 126.

94.——Relief Department.—Railroad employee recovering judgment against company for personal injuries, and accepting the amount thereof, cannot recover benefits from the relief department of the corporation.—Koeller v. Chicago, B. & Q. R. Co., Neb., 130 N. W. 420.

95.——Safe Place.—A superintendent in charge of a room wherein an electrician, under his orders, was putting up wiring, is bound to use ordinary care for the electrician's safety, and a failure is negligence.—Chicago Veneer Co. v. Jones, Ky., 135 S. W. 430.

96.——Safe Place.—The rule as to duty to furnish safe place to work does not apply to one making a dangerous place safe.—Henderson v. United States Gypsum Co., Kan., 114 Pac. 233.

97.——Vice-Principal.—Where neglect of duty by foreman is proximate cause of injury to servant, concurrent negligence of foreman as fellow servant held not to change liability of master.—Schmolt v. H. W. Wright Lumber Co., Wis., 130 N. W. 499.

98.——Youthful Servant.—Notice of danger is not enough, but a servant of immature age must have sufficient instruction to enable him to avoid the danger.—Kuphal v. Western Montana Flouring Co., Mont., 114 Pac. 122.

99. **Mechanics' Liens**—Action.—Where a contractor was prevented from continuing performance of a contract by the owner's failure to make payments as they matured, it was entitled to foreclose a mechanic's lien for the amount due in an action on the contract, and was not limited to its remedy on quantum meruit.—Hobbs v. Head & Dowst Co., C. C. A., 184 Fed. 409.

100.——Notice.—Failure to record contract does not make contractor agent of owner, to the extent of dispensing with notice of lien to owner.—Williams & Davisson Co. v. Bailey, W. Va., 70 S. E. 696.

101.——Public Building.—No valid lien can arise in favor of materialmen or mechanics as against a school building belonging to a municipal corporation.—Aetna Indemnity Co. v. Town of Comer, Ga., 70 S. E. 676.

102.——Subcontractors.—Owners of building to be constructed not securing materialmen by a bond from contractors held personally re-

sponsible to materialmen for material furnished under Act 180 of 1894.—C. W. Robinson Lumber Co. v. W. O. & C. G. Burton, La., 54 So. 582.

103. **Mortgages**—Assignment.—Where an assignment of a mortgage did not constitute a transfer of the mortgagee's power of sale, foreclosure by the assignee vested only a right to subject the land to the debt by legal proceedings.—Morton v. Blades Lumber Co., N. C., 70 S. E. 623.

104.——Deeds so Intended.—A deed intended as a mortgage will be treated as such so far as the courts can do so without injury to the rights of third parties.—Walton v. Moore, Or., 114 Pac. 105.

105.——Power of Sale.—Recitals in a deed on foreclosure and in the affidavit under the power of sale as to amount of the purchase price do not estop the mortgagor or mortgagee.—Gilson v. Nesson, Mass., 94 N. E. 471.

106.——Priority.—The question of priority between a purchase-money mortgage and another cannot be raised, unless the mortgages concur in time or the priorities are controlled by equities between the mortgagees.—Wakefield v. Fish, Wash., 114 Pac. 180.

107. **Municipal Corporations**—Automobile.—In the absence of statutory provision an owner of an automobile held not liable for personal injury caused by a borrower's negligence.—Hartley v. Miller, Mich., 130 N. W. 336.

108.——Notice of Defect.—It is only where a sidewalk was properly constructed originally, and has become defective, that notice of the defect must be shown to charge the city with liability for injuries.—Roney v. City of Des Moines, Iowa, 130 N. W. 396.

109. **Negligence**—Care.—Where a person's negligence causes an injury, the mere fact that the particular form of the injury could not be anticipated is no excuse.—Chicago Veneer Co. v. Jones, Ky., 135 S. W. 430.

110.——Duty Owed.—A cause of action based on negligence exists only where defendant wrongfully fails to perform some duty owed to plaintiff.—Tawney v. Atchison, T. & S. F. Ry. Co., Kan., 114 Pac. 223.

111. **Nuisances**—Ordinary Sensibilities.—In determining whether the maintenance of a business in a residence district in a city is a nuisance, only the effect on persons of ordinary sensibilities should be considered.—First Avenue Coal & Lumber Co. v. Johnston, Ala., 54 So. 598.

112. **Parent and Child**—Loss of Services.—Independent of statute, a father whose son was negligently killed could only recover for loss of services accruing between the injury and the death.—Verlinde v. Michigan Cent. R. Co., Mich., 130 N. W. 317.

113. **Partnership**—Agency.—Where plaintiff acted as defendant's subagent in selling lands, and was to receive one-half of the net commissions, held, that they were not partners.—Duensing v. Paine & Williamson, Iowa, 130 N. W. 385.

114.——Leased Premises.—Where a partnership is carrying on business in leased premises, neither partner can, without consent of the other, renew the lease in his own name.—Knapp v. Reed, Neb., 130 N. W. 430.

115. **Principal and Agent**—Liability of Agent.—An agent who exceeds his authority or is negligent is liable to his principal for resulting damages.—Bevis v. Big Bend Abstract Co., Wash., 114 Pac. 191.

116. **Principal and Surety**—Extension of Debt.—An extension of a mortgage not made upon a consideration will not discharge a surety thereon.—Schwartz v. Smith, 128 N. Y Supp. 1.

117. **Public Lands**—Title.—An entryman on public lands secures no title to the land he desires to homestead until he has earned his patent.—Knapp v. Alexander & Edgar Lumber Co., Wis., 130 N. W. 504.

118. **Quieting Title**—Legal Title.—The holder of the legal title to uninclosed, unimproved, and unoccupied land has sufficient possession to entitle him to sue to quiet title.—McNamara Syndicate v. Boyd, Va., 70 S. E. 694.

119. **Railroads**—Negligence at Crossing.—As a general proposition a locomotive engineer is not chargeable with negligence for not stopping his train because he sees a foot traveler approaching the track at a crossing in the daytime.—Horan v. Boston & M. R. R., C. C. A., 184 Fed. 453.

120.——Trespasser.—Injury to a trespasser on a railroad train by a collision due to a misplaced switch held insufficient to establish a willful or wanton injury.—Denny v. Chicago, R. I. & P. Ry. Co., Iowa, 130 N. W. 363.

121. **Reformation of Instruments**—Equity.—An instrument, failing to conform to the agreement of the parties through mutual mistake, will be reformed in equity.—Martin v. Hempstead County Levee Dist. No. 1, Ark., 135 S. W. 453.

122. **Sales**—Reliance on Representations.—Failure of a buyer to ascertain the truth of the seller's representations held not to make the contract binding on the buyer who relied on the seller's representations.—Hunt v. Davis, Ark., 135 S. W. 458.

123.——Retention of Property.—A vendor of real estate for a specified sum of money and a registered horse, on discovering that the horse is not registered, may retain the horse and recover damages.—Kleeb v. McInturff, Wash., 114 Pac. 184.

124.——Waiver of Cash.—Cash payment for lumber sold was waived by the seller's failure to demand it for several weeks after delivery.—Hirsch Lumber Co. v. Hubbell, 128 N. Y. Supp. 85.

125.——Warranty.—Where a machine is sold for a particular use, there is an implied warranty that it is fit for that use.—Doylestown Agricultural Co. v. Ewing, Del., 79 Atl. 212.

126. **Set-Off and Counterclaim**—One Tort Against Another.—One tort cannot be pleaded as a counterclaim to an action for another, when there is no necessary or legal connection between them.—Kelly v. Webster, 128 N. Y. Supp. 58.

127. **Tenancy in Common**—Adverse Holding.—A stepfather entering into possession by virtue of his marital rights, so that he and infant stepchildren held possession as cotenants, held not entitled to acquire adverse title during the minority of the children, nor thereafter, in the absence of ouster.—Sibley v. Sibley, S. C., 70 S. E. 615.

128. **Trade-Marks and Trade-Names**—Generic Names.—Names which are generic, or which are merely descriptive of an article of trade, of its qualities or characteristics, cannot be employed as trade-marks or trade-names.—Esselstyn v. Holmes, Mont., 114 Pac. 118.

129. **Trespass**—Ornamental Trees.—The measure of damages for wrongfully cutting ornamental trees is the difference in value of the land before and after the cutting.—Williams v. Elm City Lumber Co., N. C., 70 S. E. 631.

130.——Possession.—Trespass quare clasum can be maintained only by one in the actual or constructive possession of the premises.—Knapp v. Alexander & Edgar Lumber Co., Wis., 130 N. W. 504.

131. **Trover and Conversion**—Demand.—A demand, while the goods are in defendant's possession, held necessary to an action for conversion of goods delivered by plaintiffs to defendant, under a contract of sale, even if the contract was void.—Jebeles & Colias Confectionery Co. v. W. H. Hutchinson & Son, Ala., 54 So. 618.

132. **Vendor and Purchaser**—Marketable Title.—A purchaser is never required to accept a doubtful title.—Elkins v. Seigler, N. C., 70 S. E. 636.

133. **Wills**—Power of Appointment.—Power to appoint among lineal descendants of testator held not to confine power to those in being during life of testator.—Leverett v. Rivers, Mass., 94 N. E. 470.

134.——Probate.—The court should admit to probate a paper propounded as a will, if it is in proper form and properly executed, and testator is shown to possess the requisite capacity.—Conoway v. Fulmer, Ala., 54 So. 624.

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CONTENTS.

EDITORIAL.

Oregon's Constitution Making it the Duty of Its Supreme Court to Enter Final Judgments on Appeal 55

NOTES OF IMPORTANT DECISIONS.

Trade Mark—Exception to the Rule that a Regional Name Cannot be Used as an Exclusive Trade Mark 57

LEADING ARTICLE.

The Trust Decisions. By Wm. L. Royall 57

LEADING CASE.

Negligence of Drawer Occasioning Forgery so as to Justify Drawee in Paying Draft. S. Weisberger Co. v. Barberton Savings Bank Co., Supreme Court of Ohio, March 28, 1911 (with note) 65

CORAM NON JUDICE.

Auto-Intoxication and Accident Insurance 68

BOOK REVIEWS.

The Modern Law of Evidence 69
American State Reports 69
HUMOR OF THE LAW 69
WEEKLY DIGEST OF CURRENT OPINIONS 70

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